

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-1390

To be argued by
CONSTANCE CUSHMAN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1390

UNITED STATES OF AMERICA,

Appellee,

—V.—

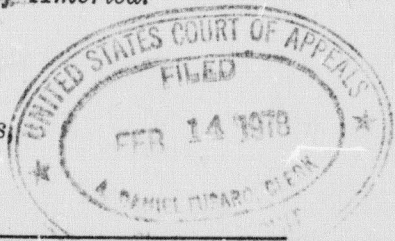
WILSON ARROYO-ANGULO, HUGO GOMEZ, JAIME
RAYO-MONTANO and GUILLERMO MORENO,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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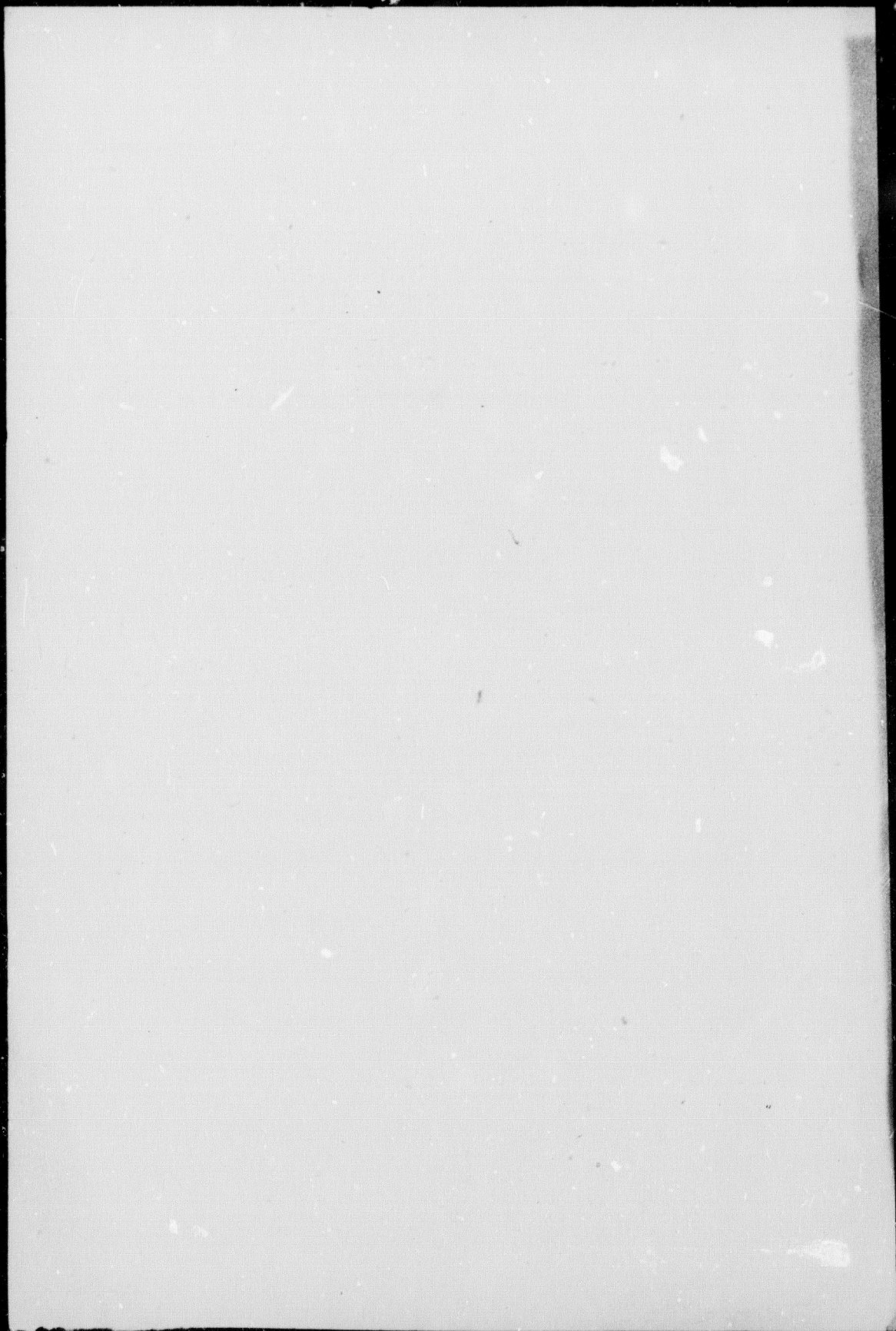


TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Statement of Facts	3
The Government's Case	3
The Defense Case	15
ARGUMENT:	
POINT I—There Was No Error In The Court's Conduct of In Camera Proceedings During The Course of The Trial	16
POINT II—There Was No Error in The Admission into Evidence of Rivas' Cooperation Agreement, Nor in the Prosecutor's Reference to that Agreement During Summation	21
POINT III—The Court's Instructions Concerning Venue Were Without Error	24
POINT IV—Arroyo's Statements Were Properly Admitted Against Him	26
POINT V—Arroyo's Motion for Severance Was Properly Denied	32
POINT VI—Similar Act Evidence Was Properly Received Against Gomez, and the Evidence Against Gomez was Clearly Sufficient for Conviction ...	36
CONCLUSION	41

TABLE OF AUTHORITIES

Cases:

	PAGE
<i>Brady v. Maryland</i> , 373 U.S. 83 (1963)	20, 21
<i>Bruton v. United States</i> , 391 U.S. 193 (1968) . . .	14, 16, 17, 19, 27, 33
<i>Davis v. Alaska</i> , 415 U.S. 308 (1974)	23
<i>Evalt v. United States</i> , 359 F.2d 534 (9th Cir. 1966)	23
<i>Evans v. United States</i> , 284 F.2d 393 (6th Cir. 1960)	17
<i>Glasser v. United States</i> , 315 U.S. 60 (1942)	40
<i>Hollis v. Smith</i> , Dkt. No. 77-2057, slip. op. 839 (2d Cir. Jan. 3, 1978)	23
<i>In re Grand Jury Subpoena Directing Edward Taylor to Appear and Testify before a Grand Jury</i> , Dkt. No. 77-1353, slip. op. 659 (2d Cir. Dec. 12, 1977)	17
<i>Silverman v. United States</i> , 556 F.2d 655 (2d Cir. 1977)	20
<i>United States v. Aloï</i> , 511 F.2d 585 (2d Cir.), <i>cert. denied</i> , 423 U.S. 1015 (1975)	23
<i>United States v. Araujo</i> , 539 F.2d 287 (2d Cir. 1976)	23, 37
<i>United States v. Bernstein</i> , 533 F.2d 775 (2d Cir.), <i>cert. denied</i> , 429 U.S. 998 (1976)	35
<i>United States v. Borelli</i> , 435 F.2d 500 (2d Cir. 1970), <i>cert. denied</i> , 401 U.S. 946 (1971)	35
<i>United States v. Bozza</i> , 365 F.2d 206 (2d Cir. 1966)	25
<i>United States v. Braunig</i> , 553 F.2d 777 (2d Cir.), <i>cert. denied</i> , 45 U.S.L.W. 3790 (June 7, 1977)	32, 37, 41
<i>United States v. Brooks</i> , 536 F.2d 1137 (6th Cir. 1976)	29
<i>United States v. Busic</i> , 549 F.2d 252 (2d Cir. 1977)	24

	PAGE
<i>United States v. Candella</i> , 487 F.2d 1223 (2d Cir. 1973), <i>cert. denied</i> , 415 U.S. 977 (1974)	24
<i>United States v. Cavallaro</i> , 553 F.2d 300 (2d Cir. 1977)	37
<i>United States v. Chestnut</i> , 533 F.2d 40 (2d Cir.), <i>cert. denied</i> , 429 U.S. 829 (1976)	37, 38, 40, 41
<i>United States v. Clark</i> , 475 F.2d 240 (2d Cir. 1973)	17
<i>United States v. Cohen</i> , 518 F.2d 727 (2d Cir.), <i>cert. denied</i> , 423 U.S. 926 (1975)	35
<i>United States v. Cohen</i> , 489 F.2d 945 (2d Cir. 1973)	37
<i>United States v. Corr</i> , 543 F.2d 1042 (2d Cir. 1976)	35
<i>United States v. Covello</i> , 410 F.2d 536 (2d Cir. 1969), <i>cert. denied</i> , 396 U.S. 879 (1970)	20, 21
<i>United States v. Deaton</i> , 381 F.2d 114 (2d Cir. 1967)	36
<i>United States v. DeSapio</i> , 435 F.2d 272 (2d Cir. 1970), <i>cert. denied</i> , 402 U.S. 999 (1971)	35
<i>United States v. DiGiovanni</i> , 544 F.2d 642 (2d Cir. 1976)	35
<i>United States v. Eliano</i> , 522 F.2d 201 (2d Cir. 1975)	40
<i>United States v. Finkelstein</i> , 526 F.2d 517 (2d Cir. 1975), <i>cert. denied</i> , 425 U.S. 960 (1976)	35
<i>United States v. Freedman</i> , 445 F.2d 1220 (2d Cir. 1971)	37
<i>United States v. Freeman</i> , 498 F.2d 569 (2d Cir. 1974)	40
<i>United States v. Fuentes</i> , Dkt. No. 77-1083, slip. op. 5883 (2d Cir. Sept. 14, 1977)	32

	PAGE
<i>United States v. Gambino</i> , Dkt. No. 77-1336, slip. op. 473 (2d Cir. Nov. 21, 1977)	32
<i>United States v. Gerry</i> , 515 F.2d 130 (2d Cir.), cert. denied, 423 U.S. 832 (1975)	36
<i>United States v. Gillette</i> , 189 F.2d 449 (2d Cir.), cert. denied, 342 U.S. 827 (1951)	25
<i>United States v. Gottlieb</i> , 493 F.2d 987 (2d Cir. 1974)	19
<i>United States v. Grady</i> , 544 F.2d 598 (2d Cir. 1976)	37
<i>United States v. Herman</i> , 544 F.2d 791 (5th Cir. 1977)	29
<i>United States v. Infanti</i> , 474 F.2d 522 (2d Cir. 1973)	24
<i>United States v. Johnson</i> , 382 F.2d 280 (2d Cir. 1970)	36, 37
<i>United States v. Kilpatrick</i> , 458 F.2d 864 (7th Cir. 1972)	25
<i>United States v. Koss</i> , 506 F.2d 1103 (2d Cir. 1974), cert. denied, 420 U.S. 977 (1975)	23
<i>United States v. Leonard</i> , 524 F.2d 1076 (2d Cir. 1975), cert. denied, 425 U.S. 958 (1976)	37, 41
<i>United States v. Martinez-Carcano</i> , 557 F.2d 966 (2d Cir. 1977)	32
<i>United States v. Medico</i> , 557 F.2d 309 (2d Cir. 1977)	32
<i>United States v. Miley</i> , 513 F.2d 1191 (2d Cir.), cert. denied, 423 U.S. 842 (1975)	35
<i>United States v. Miller</i> , 478 F.2d 1315 (2d Cir.), cert. denied, 414 U.S. 851 (1973)	37
<i>United States v. Moten</i> , Dkt. No. 77-1085, slip. op. 5769 (2d Cir. Sept. 2, 1977)	20, 35

	PAGE
<i>United States v. Nathan</i> , 476 F.2d 456 (2d Cir.), cert. denied, 414 U.S. 823 (1973)	24, 37
<i>United States v. Pacelli</i> , 491 F.2d 1108 (2d Cir.), cert. denied, 419 U.S. 826 (1974)	20
<i>United States v. Papadakis</i> , 510 F.2d 187 (2d Cir.), cert. denied, 421 U.S. 950 (1975)	36, 37
<i>United States v. Pomares</i> , 499 F.2d 1220 (2d Cir.), cert. denied, 419 U.S. 1032 (1974)	29
<i>United States v. Prueitt</i> , 540 F.2d 995 (9th Cir. 1976)	25
<i>United States v. Ricco</i> , 549 F.2d 264 (2d Cir.), cert. denied, 45 U.S.L.W. (Apr. 28, 1977)	35
<i>United States v. Rollins</i> , 522 F.2d 160 (2d Cir. 1975), cert. denied, 424 U.S. 918 (1976)	31
<i>United States v. Rosenwasser</i> , 550 F.2d 506 (2d Cir. 1977)	18, 19, 37
<i>United States v. Ross</i> , 493 F.2d 771 (5th Cir. 1974)	29
<i>United States v. Sacco</i> , Dkt. No. 76-1373, slip op. 6203 (2d Cir. Oct. 5, 1977)	35
<i>United States v. Schwartz</i> , 535 F.2d 160 (2d Cir. 1976), cert. denied, 430 U.S. 906 (1977)	31
<i>United States v. Smith</i> , 525 F.2d 1017 (10th Cir. 1975)	29
<i>United States v. Stirling</i> , Dkt. No. 77-1140, slip. op. 1401 (2d Cir. Feb. 2, 1978)	30, 31
<i>United States v. Vario</i> , 484 F.2d 1052 (2d Cir. 1973), cert. denied, 414 U.S. 1129 (1974)	40
<i>United States v. Williams</i> , 536 F.2d 810 (9th Cir.), cert. denied, 429 U.S. 839 (1976)	25

	PAGE
<i>United States v. Williams</i> , 470 F.2d 915 (2d Cir. 1972)	36
<i>United States v. Wingate</i> , 520 F.2d 309 (2d Cir. 1975), cert. denied, 423 U.S. 1074 (1976)	16, 17, 33

OTHER AUTHORITIES

<i>Federal Rules of Criminal Procedure</i> , Rule 11 ...	26, 27, 29, 30
<i>Federal Rules of Criminal Procedure</i> , Rule 16	18
<i>Federal Rules of Evidence</i> , Rule 404(b)	37
<i>Federal Rules of Evidence</i> , Rule 609	41
Title 18, United States Code, Section 3500	20

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 77-1390

UNITED STATES OF AMERICA,

Appellee,

—v.—

WILSON ARROYO-ANGULO, HUGO GOMEZ, JAIME RAYO-
MONTANO and GUILLERMO MORENO,
Defendants-Appellants.

BRIEF FOR THE UNITED STATES OF AMERICA

PRELIMINARY STATEMENT

Wilson Arroyo-Angulo ("Arroyo"), Hugo Gomez, Jaime Rayo-Montano ("Rayo") and Guillermo Moreno appeal from judgments of conviction entered on July 21, 1977, in the United States District Court for the Southern District of New York, after a five-week trial before the Honorable Kevin T. Duffy, United States District Judge, and a jury.

Indictment S77 Cr. 102, filed on May 4, 1977, charged the four appellants and two others, Jose Jeroncio Ahon-Casquete ("Ahon") and John Doe, also known as "El Flaco" and "the Seaman," with violations of the federal narcotics laws.* Count One charged all the defendants

* The indictment was dismissed as to Ahon after the suppression of certain evidence, at the close of the Government's case. John Doe has never been arrested. Indictment S77 Cr. 102 super-

[Footnote continued on following page]

with conspiracy to violate the federal narcotics laws from December 20, 1975 until February 19, 1976 together with others known and unknown to the Grand Jury. Count Two charged each of the defendants with aiding and abetting the distribution of one kilogram of cocaine on February 19, 1976, in violation of Title 21, United States Code, Section 841(a)(1).

Trial commenced on May 18, 1977.* On June 23, 1977, the jury convicted each defendant on both counts. On July 21, 1977, Judge Duffy sentenced the defendants, who had been in custody in lieu of bail, or on other charges, as follows:

seded Indictment 77 Cr. 102, filed on February 15, 1977, which had not named Ahon as a defendant, but had contained identical charges against Arroyo, Gomez, Rayo and Moreno.

* Jury selection began on Wednesday, May 18, 1977. During a luncheon recess on that day, before jury selection had been completed, the defendants Arroyo and Ahon became involved in a fight in the marshals' holding area on the third floor of the courthouse. Ahon suffered lacerations on his head and chest, which were heavily bandaged, and his trousers were spattered with blood. Upon his return to court his condition was observed by the members of the jury panel. That panel was dismissed on the consent of all parties, and jury selection was postponed until the following Monday, May 23, 1976, to ensure a sufficiently large pool to provide the requisite number of jurors who could sit for a several-week trial. The jury was empanelled and sworn on May 23, 1977.

This incident prompted the District Judge to take stringent security precautions during the trial.

	<i>Count One</i>	<i>Count Two</i>	
Guillermo Moreno:	15 years	15 years	Consecutive
Hugo Gomez:	15 years	15 years	Concurrent; consecutive to sentence of 15 years imposed in District of Oregon on July 8, 1977 *
Wilson Arroyo:	15 years	15 years	Concurrent
Jaime Rayo:	7 years	7 years	Concurrent; concurrent with sentence of 15 years imposed in District of Oregon on Mar. 30, 1977

STATEMENT OF FACTS

A. The Government's Case

The Government's chief witness at the trial was Emilio Rivas, a co-conspirator who had been arrested in Manhattan on February 19, 1976 for the sale of the kilogram of cocaine referred to in Count Two of the Indictment. Rivas had pleaded guilty in the Southern District of New York to one count of an indictment charging him with conspiracy to distribute and distribution of cocaine. On July 13, 1976, the Honorable Henry F. Werker, United States District Judge, had sentenced him as a

* See footnote, page 13, *infra*.

second felony offender to a term of twenty years' imprisonment to be followed by six years' special parole. Thereafter, Rivas decided to cooperate with the Government.*

At trial, Rivas testified about his activities in selling cocaine and marijuana and his participation in the importation of cocaine. In particular he recounted how he had assisted the named defendants to smuggle some twenty kilograms of cocaine, worth over \$700,000, from a Colombian ship docked at the port of San Francisco in approximately January, 1976. It was with part of this shipment that he had been arrested on February 19, 1976, in Manhattan. His testimony was supported by extensive documentary corroboration.

Rivas testified that he had sold cocaine in ounce and eighth-kilo quantities since approximately 1970, and that Jose Cambindo was one of his sources of supply. (Tr. 176-99). He testified about a network of associates, Colombian nationals settled in Brooklyn, involved in the business of selling cocaine. (Tr. 176-99). He told how, in late 1975, he went with Cambindo to San Francisco, California, to obtain cocaine which would be delivered

* Upon his arrest Rivas had offered to cooperate with the Government, naming one "Charlie," otherwise unidentified, as his source for the kilogram of cocaine with which he was arrested. He consented to wear a recording device to a meeting with "Charlie" which was, according to him, to take place the night of his arrest. The agents accompanied him to the location of this supposed meeting, but no one arrived. Rivas did not otherwise cooperate prior to his sentence, but rather clung to his uncorroborated story about "Charlie." Only after his sentence did he admit that that story was a fiction, and he began to give the information which, when corroborated, formed the basis of this indictment. Rivas was extensively cross-examined at trial concerning the story which he had told about "Charlie" prior to his sentence. (Tr. 465-95).

there aboard a Gran Colombiana Line vessel. He described how he, Rivas, and "El Bolla," a nephew of Cambindo's, were the "pickup-men," or drivers, and how another nephew, "El Walo," was a swimmer whom Rivas and "El Bolla" drove to the waterfront, discharged, and picked up later with the cargo, a package of cocaine which had been lowered from the ship. Rivas helped transport the cocaine by air back to Brooklyn, and received approximately \$4,500 in cocaine and cash for his part in this transaction. He testified that this was the first time he had participated in such a venture. (Tr. 229-339).

While in San Francisco on that occasion, Cambindo introduced Rivas to the defendant Guillermo Moreno, another Colombian national. Rivas testified that at that time he had already known of Moreno, in part because Moreno's aunts, Ana Moreno and Antonia Renteria, had been renting the second floor of Rivas' two story house at 641 Glenmore Drive in Brooklyn since the spring of 1975. (Tr. 202-03).^{*} Rivas testified that he and Cambindo went to Moreno's house in San Francisco several times and there he met a Colombian woman whom Rivas knew well from Brooklyn,^{**} Tulia Enriquez-Segura, her daughter, Maria Theresa ("Maite"), Tulia Segura's boyfriend, the defendant Jose Jeroncio Ahon-Casquete, and Maite's boyfriend, the defendant Jaime Rayo. (Tr. 243-46). The defendant Wilson Arroyo-Angulo was also there on occasion. (Tr. 291).^{***}

^{*} Cambindo was a "good friend" of one of Moreno's aunts, Antonia Renteria, and had visited her in Rivas' house. (Tr. 202-03).

^{**} Tulia Segura had worked in a grocery store next door to a butcher shop which Rivas owned and ran. (Tr. 244). That grocery store was operated by one Freddy Gonzalez, the owner of the bar where Rivas first bought and sold cocaine. (Tr. 176-77).

^{***} Rivas described the location of Moreno's house, and Drug Enforcement Administration agent Michael Fiorentino testified about having conducted surveillance in that neighborhood during November, 1975 and having seen Moreno coming and going from

[Footnote continued on following page]

Shortly after Rivas' return to New York, Guillermo Moreno paid a visit to his aunts in Rivas' house in Brooklyn. At that time Moreno began inquiring about "business" in New York, and when Rivas responded that it was not good because he had no "material," Moreno stated that he could obtain "material" coming on ships to San Francisco, and could supply Rivas. Rivas agreed. (Tr. 267-69). Moreno paid a second visit to his aunts around New Year's Day, 1976, and repeated his offer; the two discussed Rivas' making a trip to San Francisco to "pick up" the cocaine. (Tr. 270, 271). Shortly after Moreno returned to California, Rivas testified, he received a call from Moreno, through the aunts,* asking him to come to San Francisco, with Ana Moreno, the following day. He testified that he flew by American Airlines,** (Tr. 272-73). Moreno had moved to an address on San Diego Avenue, a few blocks from Mission Street in Daly City.***

106 Fair Oaks Avenue, as though he lived there, and having also seen Jaime Rayo, Wilson Arroyo and Jose Jeroncio Ahon-Casquete visiting there. (Tr. 1344-51). Surveillance photographs of Moreno, Arroyo, Rayo and Ahon which Fiorentino took in that neighborhood were introduced in evidence. (GX 17, 21, 22). Phone tolls showed the phone to be listed in the name of one William Pagan, but reflected numerous calls to the number listed to Ana Moreno at 641 Glenmore Drive, Brooklyn. (GX 7, 40, 41).

* Telephone toll records from 501 San Diego Avenue in Daly City likewise showed the phone listed in Pagan's name, but showed numerous calls to Ana Moreno's number. The toll records also showed two calls to Rivas' own number, one on January 26, 1976 and the second on February 2, 1976. (GX 7, 40, 41).

** The Government introduced in evidence an airline ticket from New York to San Francisco on American Airlines in the names Wilfredo Borrero (an alias used by Rivas) and Anna Renteria (Ana Moreno's maiden name), for January 22, 1976. (GX 2).

*** Norman Guy, the owner and resident superintendent of 501 San Diego Avenue, identified Guillermo Moreno as the occupant of Apartment 8, from December, 1975, until May, 1976. William Pagan had come with Mr. Moreno to rent the apartment in December, and Mr. Guy's records were carried in Pagan's name. Mr. Guy testified that Pagan did not live in the apartment. (Tr. 1230-42).

Moreno lived on the third floor, but he, Rivas, stayed in an apartment immediately below Moreno's, which was unfurnished and had been newly rented for Moreno's friend, Hugo. (Tr. 276-79).^{*} A couple of days after Rivas and Ana Moreno arrived in San Francisco, Hugo arrived with another friend whose name Rivas did not remember and moved in with Rivas. Rivas identified the defendant Hugo Gomez as Moreno's friend "Hugo." (Tr. 281).^{**}

The ship's arrival was delayed several days. While Moreno and Rivas were waiting they spent time with Hugo and his friend, and with Tulia Segura, the defendants Ahon, Rayo, Arroyo, and others. (Tr. 289). During this time Moreno gave or loaned money to Hugo to furnish Apartment 5. (Tr. 286). With Rayo and Arroyo, Rivas went to an apartment in San Francisco which he called "the house of the swimmers" because among the men who gathered there were swimmers for cocaine and marijuana arriving by ship from Colombia. Rivas iden-

^{*} Mr. Guy testified that Apartment 5, immediately below Apartment 8, was rented to one Pedro Robles, who said he was a friend of Moreno's. The term began officially as of February 1, 1976, but Mr. Guy testified that the tenant moved in somewhat earlier. (Tr. 1244-47). Pacific Gas & Electric Company records (GX 70) showed that electricity for that apartment in the name Robles was turned on January 22, 1976, the same date as the American Airlines ticket reflecting Rivas' trip to San Francisco. (GX 2).

^{**} Agent Fiorentino testified concerning surveillance he conducted in the vicinity of 501 San Diego Avenue in March, 1976, and identified pictures taken at that time of Moreno, Gomez, and another man. (GX 18, 19; Tr. 1434-52). Rivas testified that he had seen that other man before but could not identify him. (Tr. 416-17; GX 38).

tified two photographs as being of swimmers he met there with Arroyo and Rayo. (Tr. 416-17; GX 38).*

Also during this period, Rivas testified, Moreno decided to purchase a new car, since his was "hot," having been "seen too much." Moreno, his aunt, a friend "to interpret" and Rivas drove to a used car lot in a town whose name began with "San;" there, Rivas testified, Moreno purchased a Pontiac, trading in his old Pontiac, and his aunt signed the papers. (Tr. 295-97).**

After almost two weeks of waiting, Rivas testified, he, Moreno, Gomez, and Moreno's aunt observed that a Gran Colombiana line ship had arrived in the port of San Francisco. (Tr. 305). Rivas said that the name was short, either "Pasto" or "Tunja." *** (Tr. 335). He,

* Agent Fiorentino testified these two people were present in the car with Arroyo and Rayo when they were arrested on May 27, 1976. Rayo and another were wearing wetsuits and Arroyo was driving; the two wearing wetsuits had been observed by agents on surveillance entering and emerging from the water near a Gran Colombiana line ship then berthed in the port of San Francisco. No drugs were found. This incident was proved as a subsequent similar act, to be considered solely against Rayo and Arroyo. See *infra*, p. 12.

** GX 5 and 6 consisted of documents of purchase of a 1972 Pontiac Firebird, and the trade-in of a 1970 Pontiac, at the Fairway Motor Company in San Bruno, California, by Ana Moreno and Ramon Ortiz on January 30, 1976. Rivas identified a photograph of Ortiz as being that of a man whom he had seen but whose name he did not know. (Tr. 416-17; GX 38). Agent Fiorentino testified that during October, 1975 through January, 1976 he observed Moreno driving a 1970 Pontiac; after February, 1976 he observed Moreno driving the Firebird, and frequently visiting the residence of Ramon Ortiz at 219 Brussels Street. (Tr. 1455-56, 1461-64).

*** Port documents showed that the Gran Columbian line vessel, Ciudad de Tunja, berthed in San Francisco at Pier 50 A from February 1, 1976 through February 5, 1976. (GX 56).

Moreno, Gomez, and Gomez' friend went to the "Mission district" in San Francisco to locate a seaman to make arrangements to obtain the cocaine. They did not find him that day. (Tr. 307). They did contact Rayo and Arroyo and inform them that the ship was in port. Rayo, Arroyo and Rivas then drove around San Francisco, in the area of the docks. They planned the details of their retrieval of the cocaine, and spoke of other "jobs"—swimming for "material" near the docks—which Rayo and Arroyo had done for other people. (Tr. 332-33).

The next day Gomez, Moreno, Rivas and Gomez' friend located the sailor in a record shop near Mission Street. They went to a nearby restaurant where Gomez, his friend, Moreno and the sailor had a conversation at a table, while Rivas waited at the bar. They all then left the restaurant, and the group separated, Gomez, Moreno and Rivas meeting later that day for dinner at Moreno's apartment. (Tr. 336-38). At dinner, Moreno stated that the arrangements for picking up the cocaine from the ship were now complete. It was determined that Ahon's car would be used for the pickup.

Moreno, Gomez, Rivas and Gomez' friend drove to Tulia Segura's home, and then, with Rayo, to the "house of the swimmers" to meet Arroyo. Gomez and Moreno left, and Rivas, Arroyo and Rayo returned to Tulia Segura's house to borrow Ahon's car, which Rivas described as old, large, and dark. (Tr. 662).^{*} The three also went to the "house of the swimmers" in an effort to arrange to pick up another cargo for another importer. While there, it was decided not to use Ahon's car; instead they borrowed a blue Mustang with a red stripe

^{*} This was corroborated by documents of purchase, reflecting the purchase of a 1969 black Pontiac sedan by Jose Jeroncio Ahon Casquete on January 2, 1976. (GX 8).

from a Puerto Rican man who was there.* (Tr. 363-65). They borrowed that car, went to Arroyo's house in Pacifica for the swimmers to don skin-diving wetsuits, and then in the evening returned to the Pier 50 area. Rivas testified that he, as the driver of the car, discharged Arroyo and Rayo into the water near a small boat-ramp used for pleasure boats.** Some time later Rivas returned to pick up the swimmers, and when the two returned to the car they were carrying a large wet bundle like a sailor's duffel bag. (Tr. 367-69). They loaded this into the car and all three drove with it to Moreno's building.

When they arrived, Moreno came downstairs and helped Rivas carry the bundle to Apartment 5. Gomez and his friend were also in the apartment. (Tr. 368). The swimmers, Rayo and Arroyo, left briefly but returned to participate in counting the packages. Moreno emptied the duffel bag into the bathtub, and, with Gomez, counted out the packets which were contained therein. Rivas testified that there were thirty-two small packets, one pound each, two larger packets of about one kilogram each, and three one and one-half kilogram packets. When he saw them, Gomez set aside the three largest saying, "These are ours." (Tr. 370). They then opened one of those packages and divided it into eight-ounce and eighth-kilo packages, so that Rivas, who was to leave on the following day, could take some cocaine with him. (Tr.

* Fiorentino testified that he had seen such a car, driven and owned by Jose Ignacio Cuadra, and occupied also by Arroyo, in the area of the piers in October and November, 1975. (Tr. 1430-33, 1497-1502).

** Fiorentino described in detail the area of the piers, corroborating Rivas' description exactly, and pointed out on GX 23, an aerial photograph of the pier area, the small pleasure-boat ramp to which Rivas had referred. (Tr. 1340-42). This was the same ramp at which Arroyo discharged and picked up Rayo and the other man wearing wetsuits on May 27, 1976. See fn. at p. 8, *supra* and p. 12 *infra*.

379-82). Rivas testified that, based on his knowledge and experience, the white powder in the opened packet was cocaine. Moreno gave Rivas six eight-ounce packages to take to New York, and said the price would be \$1000 per ounce, less \$5000 for driving the swimmers that night. The two also discussed the possibility of Rivas' wife taking the money directly to Moreno's wife in Colombia, for an additional \$3000. (Tr. 382-83).

The following day, while Rivas was still in San Francisco, another customer came to Apartment 5. Gomez, Moreno and Rivas were all present. The customer, who was English-speaking and had called Moreno several times while Rivas was there awaiting the ship's arrival, purchased an eighth kilogram package, counting out the money to Moreno, who handed it to Gomez. Moreno said that this was a regular customer of his, who on occasion would sell several "eighths" a day. (Tr. 385-90).

Later that day Rivas flew back to New York, and in the next few days began diluting and selling the cocaine he had brought back, in one ounce and eighth-kilo quantities.* On February 19, 1976, he was arrested selling one kilogram of diluted cocaine to an undercover officer of the Drug Enforcement Administration ("DEA"). (Tr. 396-99).

In addition to Rivas' testimony, corroborated in its specific details as set forth above, the Government ad-

* On February 9, 1976, Rivas visited his probation officer. In his testimony he had placed his trip to California in early or mid-January, because he recalled having to return to see his probation officer "at the end of the month." His probation officer, Fuentes, testified that Rivas regularly reported on the third Monday of each month, and did so in fact in January, 1976 (January 19, 1976), but that because of a problem with the Immigration and Naturalization Service, Fuentes told Rivas to report on the second Monday of February, 1976, and he did so. (Tr. 886-88).

duced proof of subsequent similar acts committed by Arroyo, Rayo, and Gomez, and proof of admissions made by Arroyo.

Agents of DEA and of the United States Customs Service testified that on May 27, 1976 they were conducting surveillance in the vicinity of Pier 50D, where the Gran Colombiana Line ship Ciudad de Barranquilla was berthed. They saw a car registered to and driven by Arroyo pass by, discharging two men who rushed to the water down a nearby boat ramp and apparently entered the water. Sometime later the car returned, stopped and drove away, then returned again, and stopped on the boat ramp. The driver and another man lifted the hood of the car. A short time later two men in wetsuits came over, all four entered the car, and drove off. They were arrested at the entrance to the Pier 50 area.* Rayo and another passenger were wearing wet skin-diving wetsuits; Arroyo was driving, and there was another passenger in street clothes in the rear seat. Although Rayo denied having known Arroyo previously, (Tr. 1615-17), each had in his possession a scrap of paper bearing three identical names. (Tr. 1515-42, 1575-86; GX 29, 30).

Other agents testified that during the weekend of October 29, 1976, they were conducting surveillance on the Willamette River, in Portland, Oregon, where the Ciudad de Barranquilla was again docked. They testified that they observed Rayo, one William Rengifo and one Herman Escheverria driving about town in a red Mustang with California license plates, and returning frequently to the Saharan Motel, where they entered Rooms

* Aside from Rayo and Arroyo, the two people in the car were Otilio Ruiz, also known as "Tocayo" and Emilio Garces, also known as "El Pulpo." (Tr. 1764). Rivas had identified photographs of these two (GX 38) as "swimmers" whom he met at the "house of the swimmers." (See pages 7-8, *supra*).

20 and 22. On the night of October 31, 1976, agents observed the car stop at a cafe upstream from the ship. Shortly thereafter, Agent Bachaud saw a steadily moving floating object approach the ship from midstream, disappear for a moment behind the bow, return and continue downstream. Some time later, the red Mustang drove past the ship, paused by a nearby bridge while a small man ran to the pilings, removed a bundle and returned to the back seat of the car, and then drove off. The car was pursued by agents, and the bundle was jettisoned. The car was stopped; Rayo was in the back seat, Rengifo was arrested as he fled, and Escheverria escaped. The bundle, containing seventeen pounds of cocaine, was recovered along the chase route. Agents went to Rooms 20 and 22 of the Saharan Motel and there found Gomez in the doorway between the two rooms, a wetsuit and a pair of wet overalls in a duffel bag, and an undeveloped roll of film. The pictures, later developed, showed Gomez, Escheverria and Rengifo posing together in the same street clothes they had been seen wearing in Portland the weekend of October 29, 1976. (Tr. 1774-1897).*

Agents Fiorentino, Martin, and Allen testified about interviews they conducted with the defendant Arroyo in October, 1975 and during the spring of 1976. (Tr. 1468-71, 1502-07, 1623-78, 1693-1725). Arroyo had been arrested in Los Angeles, California, as a stowaway, on October 24, 1975. He indicated knowledge of cocaine and marijuana smuggling, offered to cooperate with the Gov-

* This episode was the basis of an Indictment, 76-234, filed in the District of Oregon on November 23, 1976. Jaime Rayo pleaded guilty to two counts of that Indictment on January 5, 1977, and on March 30, 1977, received a sentence of fifteen years on Count One and two years on Count Ten, to run concurrently. Hugo Gomez was convicted by the Court, after a non-jury trial at which was presented more detailed evidence than that proved in this case, on March 28, 1977, and on July 8, 1977 received sentences of two to fifteen years on six counts, to run concurrently.

ernment in order to avoid deportation, and became a registered and paid informant for the Drug Enforcement Administration in San Francisco. He was interviewed extensively during the last week of October, 1975, implicating Moreno, Rayo, and "Hugo," among others. After early December, 1975, he failed to maintain contact with his supervising DEA agent, but when the agents located him again in March, 1976 and arrested him he once again began to provide information * concerning the smuggling activities of himself and his associates, again in order to avoid deportation.**

The testimony concerning Arroyo's admissions to the agents who debriefed him was extremely general and brief, having been extensively redacted to comport with the requirements of *Bruton v. United States*, 391 U.S. 193 (1968). The agents testified that on the dates they interviewed him, he told them he was a swimmer who smuggled cocaine and marijuana from Gran Colombiana Line vessels in San Francisco and elsewhere, that he had done so on six or seven separate occasions which he specified; that he worked with a variety of other swimmers and for a number of employers, and was paid sometimes by the kilo and sometimes by the job, anywhere from \$1500 to \$5000. The agents, to avoid possible *Bruton* problems, did not further identify in Court the individuals with whom he said he worked.***

* Prior to the debriefing sessions in October, 1975 and March, 1976, he was advised of his *Miranda* rights. (Tr. 1623-1725).

** However, following his May 27, 1976 arrest, discussed above, he was in fact deported. He re-entered the United States, was again arrested, and was awaiting deportation from San Francisco at the time the instant indictment was filed.

*** The 3500 material supplied to all counsel in connection with this testimony did contain a more specific account of those debriefing sessions.

B. The Defense Case

In an apparent effort to impeach Rivas' testimony that although he had grown up in Buenaventura, Columbia, he first met Moreno in the fall of 1975, Moreno called two witnesses, his cousin and his cousin's wife. Mr. Davila testified that Buenaventura was a small town, that he knew most of the inhabitants by sight, that he had lived with Moreno in Buenaventura, and had seen him once in New York. On cross-examination he estimated the population of Buenaventura to be "less than 100,000 people," specifically "seventy to eighty thousand," or about "96 thousand." (Tr. 1982-93). The following day, his wife testified that she had seen Moreno play football or soccer with Rivas in Buenaventura during the 1960's, before any of them came to the United States. She also testified that Buenaventura was a small town and that she had known Rivas and his wife by sight in Buenaventura. (Tr. 2026-51).

Moreno also offered in evidence the translation of a statement made by Rivas to his probation officer prior to his sentence, in which he reiterated his story about "Charlie" being his source of supply. (Moreno Ex. B).

Rayo called to the stand Carmen "Tulia" Enriquez-Segura, the woman with whom Rayo and Ahon had been living in San Francisco. She identified herself and stated her occupation; at that point the Court called all counsel to the side bar. After some colloquy concerning the permissible scope of cross-examination, defense counsel conferred and Rayo's attorney determined to ask the witness no further questions. (Tr. 1993-2002). Thereafter, by stipulation, Rayo offered in evidence a document purporting to set forth the attendance record of Maria Theresa ("Maite") Enriquez, Rayo's girlfriend and Carmen Segura's daughter. That attendance record showed that she had been enrolled in school in Brooklyn during the fall of 1975 and winter of 1976, although she had

been absent from school an average of three days each week. (Rayo Exs. B, C). Apparently this evidence was designed to impeach Rivas' testimony that he had seen Maite at Moreno's house during his visit there in the fall of 1975.

Gomez and Arroyo presented no evidence.

ARGUMENT

POINT I

There Was No Error in the Court's Conduct Of In Camera Proceedings During The Course Of The Trial.

Moreno and Arroyo argue that the Court's conduct of *in camera* proceedings at intervals during the trial, at which not all defendants and counsel or, in one instance, all counsel, but not all defendants,* were present, and the minutes of which were sealed, deprived them of their right to confront the witnesses against them, and Moreno adds, of the right to be present at proceedings con-

* This was a motion made by Ahon to suppress testimony concerning an arrest on June 6, 1976 and post-arrest statements, as well as to suppress certain pre-indictment statements to an agent and Assistant United States Attorney in this case. Ahon was present at that proceeding, and all counsel were present during the latter portions of it.

The Government proposed to offer this evidence as a similar act and admissions against Ahon alone. Any statements ultimately ruled admissible would have been redacted to conform to *Bruton v. United States*, *supra*, and *United States v. Wingate*, 520 F.2d 309 (2d Cir. 1975), since they implicated the other co-defendants. No statements were, in fact, admitted. Although this motion based on lack of probable cause to arrest Ahon, was denied, the Court ultimately ruled this similar act evidence against Ahon inadmissible under Rule 404 of the Federal Rules of Evidence because of the paucity of other evidence implicating Ahon

[Footnote continued on following page]

cerning him.* In support of this contention Moreno observes that testimony referring to him was elicited during at least one of those proceedings, namely, the hearing on Ahon's motion at which all counsel were present.

At the outset it should be emphasized that no defendant and no attorney was excluded from any proceeding the subject of which was a motion made by him or evidence to be admitted against him at the trial. Consequently, the cases which Moreno and Arroyo rely upon ** are not in point, since each of them rests on facts in which a defendant was excluded from proceedings directly relating to evidence offered against him. At any point when some counsel or defendants were precluded from being present, the subject matter of the proceedings related solely to those who were present, and any trial testimony which may have resulted related solely to similar act evidence admitted against that defendant with limiting instructions, or to severely redacted admissions***

in the conspiracy charged. The statements to the Assistant United States Attorney were suppressed, *see* page 31, *infra*. Consequently, *nothing* pertaining to the subject matter of this hearing was received in evidence at the trial.

* Arroyo, joined by Moreno, moved in this Court for an order permitting their inspection of the sealed materials. That motion was denied. Arroyo consequently also argues that he has been effectively denied his right to appeal because he could not formulate arguments based on the sealed minutes.

Arroyo's counsel in his brief, served upon all counsel after the denial of that motion, and not sealed, made a number of references to sealed minutes and sealed documents without Court authorization to do so. In responding to those arguments the Government has, nonetheless, filed a sealed addendum to this brief, containing references to the sealed material which Arroyo's counsel did not choose to disclose.

** *In re Grand Jury Subpoena Directing Edward Taylor to Appear and Testify before a Grand Jury*, Dkt. No. 77-1353, slip op. 659 (2d Cir. Dec. 12, 1977); *United States v. Clark*, 475 F.2d 240 (2d Cir. 1973); *Evans v. United States*, 284 F.2d 393 (6th Cir. 1960).

*** To comply with *Wingate*, *supra* and *Bruton*, *supra*.

similarly admitted against that defendant with limiting instructions.

This Circuit has held that under such circumstances counsel for the co-defendants against whom the testimony is not offered may not even cross-examine the witness. *United States v. Rosenwasser*, 550 F.2d 806 (2d Cir. 1977). Had there been a severance, requiring, for example, five separate trials against the five co-defendants, none would have been entitled as a matter of right to be present at the entire trials and hearings of the others.* No more are they entitled as a matter of right to be present at hearings during a *joint* trial when those hearings relate solely to a co-defendant. Although their presence is usually permitted as a matter of practice, where, as here, the District Judge has determined that sufficient cause exists for precluding them, his exercise of discretion should be upheld.**

Moreno contends that had he been permitted to be present at the proceedings from which he was excluded, he would have known more about the Government's case against him and would have been better able to prepare his defense. This claim amounts to no more than a wholesale request for discovery, which in a criminal case is specifically circumscribed by Rule 16, F. R. Cr. P. In no case is the Government required to reveal to a defendant the full extent of incriminating information in its possession which, for whatever reason, will not be intro-

* Consequently, Moreno's suggestion that a mistrial and severance would have resolved this "problem" is absurd. Identical evidence would have been admitted against him at a separate trial, and he would have had access to no more material.

** The reasons for excluding those persons to whom the proceedings did not directly relate are set forth in the Government's sealed affidavit in opposition to Arroyo's and Moreno's motions to unseal the sealed minutes and exhibits of the trial, filed in this Court on December 28, 1977.

duced in evidence at a trial. See *United States v. Gottlieb*, 493 F.2d 987 (2d Cir. 1974).

Somewhat indirectly, Moreno argues that had he been present at any such proceedings, he would have been enabled to minimize any "spillover" onto his client from the admission of similar act evidence concerning, and admissions by, his co-defendants. At the time any such testimony was admitted at the trial, although it was, of course, received only against certain defendants, extensive 3500 material relating to it was turned over to all counsel.* This included copies of the reports of the agents who testified, insofar as they related to the subject matter of the testimony, and insofar as they contained references to any defendant on trial. The manner in which the testimony concerning Arroyo's admissions would be presented, to avoid *Bruton* problems, was likewise fully discussed among all counsel and the Court. (Tr. 1167-1202). This material was more than sufficient to inform counsel of the context of the events and statements elicited at trial, and to permit them to take action to limit "spillover."

Furthermore, the Court gave explicit and detailed instructions each time such evidence was admitted, and again during its charge, limiting the jury's consideration of that proof to the defendants particularly named. (Tr. 1469, 1522, 1636-37, 1793-94, 2318-19). Any greater involvement on the part of counsel for other defendants, far from minimizing any spillover, could only have served to emphasize their client's connection to the named defendant. In fact, as noted above, under such circumstances this Court has ruled that a defendant is not entitled to cross-examine those witnesses whose testimony was not received against him. *United States v. Rosenwasser*, *supra*.

* This material did not, however, contain any of the contents of the sealed proceedings.

Arroyo joins Moreno's claim that the *in camera* proceedings denied him his right to confrontation and, along similar lines, argues that the continued sealing of the minutes of the *in camera* proceedings, insofar as he was not privy to them, has denied him his right to appeal. (He insists, however, that for his own safety the minutes of those proceedings to which he alone *was* privy must remain sealed, except insofar as he has chosen, of his own accord and without leave of Court, to reveal them.) This contention is likewise frivolous. The materials which were sealed were so handled in accordance with the explicit provisions of Title 18, United States Code, Section 3500, and in accordance with the practice in this District and Circuit whenever the Government seeks rulings as to whether that statute or *Brady v. Maryland*, 373 U.S. 83 (1963), requires disclosure of certain materials.* The

* The pertinent portion of 18 U.S.C. § 3500 provides as follows:

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court *in camera*. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge.

This practice has been followed in numerous cases, including *Silverman v. United States*, 556 F.2d 655 (2d Cir. 1977); *United States v. Moten*, Dkt. No. 77-1085, slip op. 5769 (2d Cir. Sept. 2, 1977); *United States v. Pacelli*, 491 F.2d 1108, 1118 (2d Cir.), *cert. denied*, 419 U.S. 826 (1974); *United States v. Covello*, 410 F.2d 536, 546 (2d Cir. 1969), *cert. denied*, 396 U.S. 879 (1970).

same considerations which compelled sealing in the District Court pertain in this Court, and the District Court's ruling on those questions are reviewable for abuse of discretion by this Court, *in camera*.*

Moreno suggests that had he heard the testimony, if any, at proceedings from which he was excluded, he might possibly have learned of some exculpatory material and developed it further at the trial. But a defendant's right to be informed of any exculpatory material in the Government's possession exists independently of his rights to confront the witnesses against him, to be present at any proceedings against him, and to assist in his own defense. *Brady v. Maryland, supra*. Consequently, the Government was obligated to furnish Moreno with any such material, whether or not it was elicited at a hearing involving a co-defendant. In fact, to the extent any such material existed, it was made known to all counsel, and to the extent that appellants contend that the sealed minutes contain undisclosed *Brady* material, this Court can inspect those minutes *in camera*, in the usual fashion, and review the District Court's exercise of its discretion.

POINT II

There Was No Error In The Admission Into Evidence of Rivas' Cooperation Agreement, Nor In The Prosecutor's Reference To That Agreement During Summation.

On cross-examination of Rivas, defense counsel emphasized the fact that Rivas was serving a twenty-year sentence which he hoped would be reduced as a result of his cooperation, including his testimony in this case. (Tr.

* Furthermore, the standard on review is whether the District Judge's rulings are "clearly erroneous." *United States v. Covello, supra*.

455-56, 600-09, 622). Defense counsel also focused at length on the many prior occasions upon which Rivas admitted having lied in order to help himself in some way, (Tr. 455-98, 518-46, 622), and asked him whether he would lie at this trial to reduce his sentence. (Tr. 498). In their summations defense counsel ridiculed his negative response to that question, and argued at length that in Rivas' eyes the best way to help himself was to help the Government convict the defendants on trial. (Tr. 2183-85, 2211, 2220, 2232-33).

In order to blunt the impact of those arguments, during Rivas' direct examination the Government elicited testimony concerning his agreement to cooperate with the Government. In that connection the Government offered in evidence, and the Court received and read to the jury, almost all of the document containing the entire agreement between Rivas and the Government. (GX 39; Tr. 224). In addition, the Assistant United States Attorney made references to that agreement in her summation. Rayo now argues that this constituted reversible error.

That agreement explicitly conditioned the Government's promise of assistance to Rivas in connection with his motion to reduce sentence, upon his telling the truth to any grand jury and at any trial. It did *not*, as counsel for Rayo argues, condition that promise upon the outcome of this or any other case, nor upon the jury's decision concerning Rivas' credibility. Nor did the Assistant United States Attorney make any such misrepresentative argument to the jury. On the contrary, the Assistant United States Attorney restricted herself to the text and substance of the agreement that was in evidence. As the Assistant United States Attorney argued, the question for the jury to determine was what motivated Rivas, and whether that motivation was toward telling lies or toward telling the truth. As was argued to the jury, in

Rivas' mind, it was his cooperation agreement and the possibility of receiving a reduction of his twenty-year sentence * which motivated him to testify, and precisely because these benefits were conditioned upon his truthfulness, to tell the truth at trial. Contrary to Rayo's argument to this Court, at no point did the Assistant United States Attorney argue or suggest to the jury that the Government's support of Rivas' motion for reduction of sentence was conditioned upon a jury verdict of conviction.

This Court has repeatedly approved the admission into evidence of the terms of cooperation agreements between accomplice witnesses and the Government, as "one item relating to credibility" which the jury is entitled to evaluate, as any other. *United States v. Araujo*, 539 F.2d 287, 290 (2d Cir. 1976); *United States v. Aloï*, 511 F.2d 585, 597 (2d Cir.), *cert. denied*, 423 U.S. 1915 (1975); *United States v. Koss*, 506 F.2d 1103, 1112-13 (2d Cir. 1974) *cert. denied*, 420 U.S. 958 (1976). Particularly where, as here, the Government's principal witness had sold narcotics for several years, stolen from his employer, and repeatedly lied to the Court, his probation officer, the agents, and the deportation officers of the Immigration and Naturalization Service about the facts of his involve-

* Counsel cannot seriously question the propriety of bringing this portion of the agreement to the jury's attention. Had it been omitted or precluded, Rayo would have even more strenuously argued that an important factor in evaluating Rivas' credibility had been kept from the jury. See *Davis v. Alaska*, 415 U.S. 308, 318 (1974). The jury's function in the federal courts is to determine the facts, while the Court determines the penalty, see *Hollis v. Smith*, Dkt. No. 77-2057, slip op. 839 (2d Cir. Jan. 3, 1978); it is for this reason that questions of possible sentences are held not properly put before the jury, *Evalt v. United States*, 359 F.2d 534 (9th Cir. 1966). But *Evalt* and the other cases upon which Rayo relies involve situations in which the discussions of possible penalty were clearly extraneous to the jury's proper concerns; here, nothing could have been more critical to an evaluation of Rivas' motive and credibility than the possible benefit his testimony would obtain for him.

ment in narcotics and this case in particular, all of which was extensively explored on his cross-examination, rehabilitation of his credibility by emphasis on his present agreement with the Government was appropriate.

POINT III

The Court's Instruction Concerning Venue Were Without Error.

Rayo argues that despite what he terms "technical venue" this case should not have been brought and tried in the Southern District of New York. He further contends that the Court failed to instruct the jury properly on the question of venue, in that the Court, at the conclusion of its charge, declined to instruct the jury in so many words that in order to convict the defendants they must find that the cocaine with which Rivas was arrested in New York was the same cocaine which he obtained with the defendants in San Francisco, as he testified. No counsel had submitted such a request before the Court's charge was delivered.

Sale or attempted sale of narcotics in a district by a member of the conspiracy, when that sale is the very object of the conspiracy charged in an indictment, is surely sufficient to lay venue in that district. This is more than "technical" venue, it is the essence of a community's right to protect itself from crimes conceived and organized elsewhere which work their injury within that community. Much less has been ruled sufficient by this circuit. See e.g., *United States v. Basic*, 549 F.2d 252 (2d Cir. 1977); *United States v. Candella*, 487 F.2d 1223 (2d Cir. 1973) *cert. denied*, 415 U.S. 977 (1974); through which the force propelled by the offender; *United States v. Infanti*, 474 F.2d 522 (2d Cir. 1973); *United States v. Nathan*, 476 F.2d 456 (2d Cir.), *cert.*

denied, 414 U.S. 823 (1973). See also, *United States v. Prueitt*, 540 F.2d 995 (9th Cir. 1976) (co-conspirator's flight over district in furtherance of conspiracy sufficient to lay venue); *United States v. Williams*, 536 F.2d 810 (9th Cir.), *cert. denied*, 429 U.S. 839 (1976).

Similarly, when a crime is committed in this district, the aiders and abettors are guilty as principals, even though their participation takes place entirely outside the district. *United States v. Kilpatrick*, 458 F.2d 864 (7th Cir. 1972). See, *United States v. Bozza*, 365 F.2d 206, 221 (2d Cir. 1966); *United States v. Gillette*, 189 F.2d 449, 451 (2d Cir.), *cert. denied*, 342 U.S. 827 (1951). There was no basis upon which the judge should have dismissed the indictment for lack of venue, as he recognized in denying Moreno's motion to do so, made pretrial and at the close of the Government's case.

Furthermore, the Court had already repeatedly instructed the jury that in order to convict on Count One they must find that an overt act in furtherance of the conspiracy was committed in the Southern District of New York (Tr. 2307-8; 2320), and in order to convict any defendant on Count Two, that the crime was committed in the Southern District of New York, and that that defendant aided and abetted in its commission. (Tr. 2323).^{*} The Court emphasized that the Southern District "does not include Brooklyn, and certainly does not include San Francisco." (Tr. 2307). Since only one overt

^{*} This was substantially the language requested by the Government in its formal requests to charge submitted well in advance of the Court's delivery of its instructions to the jury. The Court's instructions, and all counsel's requests, were the subject of a conference held on the Friday before Monday summations and charge to the jury. As noted above, no defense counsel submitted a specific request concerning venue at that time, and in addition, no counsel objected to the Government's proposed instructions on the subject. Accordingly, for this reason alone, the Court should decline to review this issue.

act set forth in the indictment,* namely Rivas' attempted sale of one kilogram of cocaine, took place within the Southern District of New York, and since the crime charged in Count Two was Rivas' sale of cocaine in Manhattan, aided and abetted by the four defendants in San Francisco, it was perfectly apparent that in order to convict any defendant the jury had to believe Rivas' account of where that cocaine came from. Indeed, defense counsel made the argument several times. (Tr. 2178, 2218, 2234-48). The District Court quite properly ruled that the question of venue had been specifically placed before the jury and that to reiterate it in the form the defendants requested would merely highlight that portion of the charge in a manner detrimental to the defendants, and suggest that the Court, by even permitting the trial to go forward in this district, had already found that evidence credible. (Tr. 2334).

POINT IV

Arroyo's Statements Were Properly Admitted Against Him.

Arroyo argues that evidence of admissions he made to DEA agents Fiorentino and others, in late October and early November of 1975 and in March of 1976, should not have been received against him at trial because they were, in a broad sense, "statements made . . . in connection with . . . an offer to plead guilty" and therefore were precluded under Rule 11, F. R. Cr. P.

First, this argument is wholly without foundation in the facts established at trial, and consequently the applicable law is clearly of no assistance to Arroyo's

* The jury requested and received a copy of the indictment as its deliberations began.

position. When the defendant Arroyo made the admissions introduced at trial, no criminal charges were pending against him, contemplated, or even possible. On the contrary, he was simply a deportable alien, awaiting deportation. Therefore his admissions could not have been "in connection with" an "offer to plead guilty" within even the broadest reading of Rule 11.

The facts which were developed in the context of hearings on other issues and during the presentation of evidence during the trial are these:

Arroyo was arrested in Los Angeles on October 24, 1975, as a stowaway. He was to be deported immediately, but claimed that he had information concerning cocaine smuggling on Colombian ships which would be of value to the Government, and asked to be allowed to remain in the United States, in return for his cooperation. (Tr. 1626-32). Accordingly, rather than being deported, he was paroled into the custody of the DEA in San Francisco as a cooperating individual (Tr. 1632-35, 1663-75).

[*See Sealed Addendum filed herewith, as explained in footnote, page 17, supra.*]

He made admissions concerning five separate cocaine and marijuana smuggling operations in San Francisco, New York and Baltimore in which he had participated during an earlier [*See Sealed Addendum to Government's Brief.*] stay in the United States.* (Tr. 1632-35; 1663-75).

Thereafter, on December 3, 1975, he appeared before a Grand Jury in the District of Maryland, where he testified . . . [*See Sealed Addendum to Government's*

* Heavily redacted versions (to comply with the requirements of *Bruton, supra*) of those admissions were introduced against him at trial. *See discussion, pages 13-14, supra.*

Brief.] * Shortly thereafter, he ceased reporting to his DEA control agent, and was not located again until March, 1976. At that time he was observed by Fiorentino, placed under arrest, and told he would be deported because he had failed to continue his cooperation with the DEA which was the sole reason he had been permitted initially to remain in the United States. Having again been advised of his *Miranda* rights, he decided to resume co-operating in exchange for an agreement that he would not be deported.** Several days later he was debriefed, and told the agents about two smuggling operations in San Francisco and Los Angeles in which he had participated, in December, 1975 and in March, 1976. Again, severely redacted versions of these admissions were introduced in evidence against him at this trial.

In May, 1976 Arroyo was arrested driving a car which discharged and retrieved two divers in skin-diving wetsuits near a Gran Colombiana vessel in San Francisco. The facts of this incident were proved at trial (*see supra*, p. 12); Arroyo's subsequent confession that this was an attempted cocaine smuggling venture was not offered, since one of the men in wetsuits was a co-defendant, Jaime Rayo. Arroyo was, however, thereupon deported, and his status as a cooperating individual was terminated. Later he again reentered the country illegally, and in February, 1977 was again awaiting deportation when he was brought to New York in connection with the charges in this indictment. (Tr. 1762-63; 1767-72).

* [See *Sealed Addendum to Government's Brief.*]

** Both in October, 1975, and in March, 1976, he was told that he must cooperate fully and truthfully, commit no further crimes, not engage in any narcotics activity except under the direction of his control agent, maintain contact with his control agent as directed, and that if he did commit any crimes he would be treated "as a common criminal." (Tr. 1632-35; 1663-75; 1697-1700; 1707-09).

No narcotics charges were brought against Arroyo in October, 1975 or March, 1976. [See *Sealed Addendum to Government's Brief.*] The only evidence against Arroyo at that time consisted of his own admissions. At all times his status was simply that of a deportable alien permitted to remain in this country solely in order to cooperate. The only discussion that *anyone* had with Arroyo concerning possible prosecution consisted of the agents emphatically informing him that if he should commit a crime while cooperating with them he would be prosecuted on the same basis as had he not been cooperating,* [See *Sealed Addendum to Government's Brief.*]

Accordingly, it is evident that by no interpretation of the facts (which emerged at trial in connection with arguments of other claims made by Arroyo) can Arroyo's admissions be deemed "statements" made in connection with "an offer to plead guilty," within the meaning of Rule 11, F. R. Cr. P. Arroyo argues that his statements were made in the course of trying to work out an "arrangement" with the Government. However, no part of that "arrangement" included an offer to plead guilty. If anything, discussion of his "arrangement" was in the nature of negotiations concerning sentence, that is, whether or not he was to be deported, for his status as a deportable alien was never in doubt.

The law which Arroyo cites is consequently wholly inapposite. Each of the cases to which he refers** in-

* In fact, the crime alleged and proven at trial took place in late January or early February, 1976, during the period of his cooperation. The evidence of that crime was developed wholly independently, beginning in August, 1976, after Arroyo had stopped cooperating.

** *United States v. Herman*, 544 F.2d 791 (5th Cir. 1977); *United States v. Brooks*, 536 F.2d 1137 (6th Cir. 1976); *United States v. Pomares*, 499 F.2d 1220 (2d Cir.), cert. denied, 419 U.S. 1032 (1972); *United States v. Smith*, 525 F.2d 1017 (10th Cir. 1975); *United States v. Ross*, 493 F.2d 771 (5th Cir. 1974).

volves a defendant, charged or about to be charged in an indictment with a criminal offense, talking with an Assistant United States Attorney or investigative agent specifically about pleading guilty to that or another criminal charge. Here, there were no criminal charges pending, imminent, contemplated, or, indeed, possible at the time of Arroyo's admissions, and no conversations between Arroyo and any Assistant United States Attorney.

Indeed, in its first decision interpreting this provision of Rule 11(e), this Circuit has recently declined to apply the rule even to Grand Jury testimony given after formalization of a negotiated plea agreement and before withdrawal from the agreement. *United States v. Stirling*, Dkt. No. 77-1140, slip op. 1401 (2d Cir., Feb. 2, 1978). In that case, faced with imminent indictment, the defendant agreed to cooperate with the Government and plead guilty to one count of the indictment. He thereafter testified in the grand jury. Upon his indictment, however, he withdrew from his agreement to cooperate, and instead stood trial. His grand jury testimony was received in evidence against him. This Court affirmed his conviction, agreeing with the District Judge that to hold otherwise would subject investigative processes "to all kinds of deceptive and manipulative and misleading uses." *United States v. Stirling*, *supra* at 1444.

Even were this Court to accept the analogy, slight though it is, urged by Arroyo, that his efforts to work out an "arrangement" with the Government to avoid deportation were the equivalent of an "offer to plead guilty" under Rule 11(e), it would still be bound by its decision in *Stirling*, *supra*. Arroyo's efforts resulted in an agreement with the Government,* after which he made the

* This agreement, although less formal than that in *Stirling*, *supra*, was no less explicit in its definition of the respective obligations of the cooperating defendant and the Government.

admissions ultimately received against him at trial; he withdrew from that agreement by violating its terms, and was prosecuted as he had been warned from the outset he would be. As *Stirling* makes clear, to hold that his admissions cannot be used against him under such circumstances would indeed subject investigative processes to manipulative uses.

Furthermore, trial counsel, in apparent recognition of the utter absurdity of the argument now propounded, failed to raise it in the District Court, despite a similar argument having been explicitly and successfully raised by the codefendant Ahon in a motion to suppress certain of *his* statements. At a hearing in connection with Ahon's motion to suppress statements made during interviews in the United States Attorney's Office in the Southern District in February, 1977, testimony was taken, extensive argument heard, and the Court made detailed findings of fact and conclusions of law. (Tr. 926-60; 1014-17). Arroyo's counsel was present at that hearing. Rather than himself make such a motion to suppress Arroyo's statements prior to their receipt in evidence on the ground now raised, counsel waited until his Rule 29 motions to dismiss at the close of the Government's case, at which time he simply referred in passing (and by erroneous citation) to the major case Ahon's attorney had relied upon in *his* suppression motion. (Tr. 1955). On this record, Arroyo cannot fairly claim that he preserved the issue for review on appeal.

It is the settled law of this Circuit that

"where a party has shifted his position on appeal and advances arguments available but not pressed below, *United States v. Schwartz*, 535 F.2d 160, 163 (2d Cir. 1976) *cert. denied*, 430 U.S. 906 (1977), and where that party had ample opportunity to make the point in the trial court in a timely manner, *United States v. Rollins*, 522 F.2d 160, 165 (2d Cir. 1975), *cert. denied*,

424 U.S. 918 (1976), waiver will bar raising the issue on appeal." *United States v. Braunig*, slip op. 2773, 2779-80 (2d Cir., Apr. 11, 1977), *cert. denied*, 45 U.S.L.W. 3790 (June 7, 1977).

Accord, United States v. Gambino, Dkt. No. 77-1336, slip op. 473, 479 (2d Cir., Nov. 21 1977); *United States v. Fuentes*, Dkt. No. 77-1083, slip op. 5883, 5889-90 (2d Cir., Sept. 14, 1977); *United States v. Martinez-Carcano*, 557 F.2d 966 (2d Cir. 1977); *United States v. Medico*, 557 F.2d 309 (2d Cir. 1977).

Had Arroyo chosen to raise this argument in the District Court, the trial judge would have had the opportunity to marshal all the facts necessary for a considered ruling, and would have had the opportunity to consider the issue *before* the statements were received in evidence. The casual fashion in which the possibility of this argument was alluded to, after the completion of the Government's case in chief, deprived the trial court of these opportunities. For this reason alone, and apart from the argument's lack of merit, this argument must be rejected.

POINT V

Arroyo's Motion for Severance was Properly Denied.

Arroyo argues that his motion for severance was improperly denied, alleging several instances of prejudice which he claims were caused by his joinder with the co-defendants. His claim that one result of his joinder with the co-defendants was the necessity for "extensive" *in camera* proceedings from which he and his counsel were precluded, and the sealed minutes of which he has until now been prohibited from examining, has been discussed above, Point I. As noted above, it is immediately apparent from examination of the sealed materials that those proceedings from which he was excluded were

wholly unrelated to him, and even if his codefendants had been tried separately, those proceedings would have been conducted without his presence, the minutes sealed, and their contents never disclosed to him. Consequently those arguments have no bearing on his claim that his severance motion was improperly denied.

As a further argument in support of his claim that his severance motion was improperly denied, Arroyo contends that his joinder with the co-defendants prevented him from effectively cross-examining the agents (Fiorentino, Allen and Martin) who testified concerning his admissions (referred to in Point IV, *supra*). Those admissions were heavily redacted to comply with *Bruton, supra*, and *Wingate, supra*, and Arroyo now argues that had he been permitted to explore, on cross-examination, the extent to which those admissions implicated his co-defendants, and then, the extent to which the admissions were *not* corroborated by later DEA investigation, he could have established that the confessions in the course of his cooperation were, in fact, lies.

This argument, hypothetical in the extreme,* is rebutted by all the facts shown at trial, contained in the 3500 material provided to all counsel with respect to the testimony concerning Arroyo's confessions, and contained in the much more extensive discovery material provided to Arroyo's counsel in advance of trial pursuant to Rule 16, F. R. Cr. P. All these materials show that such cross-examination could only have convinced the jury of the

* Counsel did not request an opportunity to cross-examine the agents outside the presence of the jury for the purpose of establishing, for the record, those facts which he now contends he was precluded from placing before the jury. It is certainly doubtful that responsible trial counsel would deliberately choose to highlight the fact that his client was in a position to give detailed information concerning the criminal activities of those on trial with him, as to whom there was already substantial independent proof of guilt.

essential truthfulness of Arroyo's admissions concerning his own activities and his information concerning his co-defendants.

The proof that Arroyo, on May 27, 1976, drove two men in wetsuits to the pier in San Francisco where a Gran Columbian ship was docked, discharged them (at the location Rivas testified he did in February, 1976) and later picked them up, at a point in time when he was theoretically cooperating with the DEA, directly corroborated his admissions with respect to his own participation in similar smuggling operations. Furthermore, the detailed testimony of Rivas concerning his actions and conversations * with Arroyo in late January and early February, 1976 did nothing but substantiate Arroyo's statements concerning his own activities.

With respect to Arroyo's statements about co-defendants, known to Court and counsel, although not to the jury, it is clear from other evidence that far from being contradicted by the facts which the agents' investigation discovered, Arroyo's information concerning the co-defendants' identity, whereabouts, use of specific automobiles, associates, and involvement in large-scale narcotics smuggling was confirmed by that investigation. Rivas' testimony independently confirmed that information; surveillance and documentary research conducted by the agents** (and prompted by Arroyo's statements) confirmed it; the ultimate conviction of two co-defendants for a similar offense in Portland, Oregon convincingly confirmed Arroyo's account.***

[*See Sealed Addendum to Government's Brief.*]

* In these conversations they discussed the fact that Arroyo was a free lance swimmer for narcotics on a regular basis.

** [*See Sealed Addendum to Government's Brief.*]

*** Furthermore, had counsel inquired along these lines out of the presence of the jury, the agents would have responded that a number of other confidential informants had provided information to them essentially consistent with Arroyo's accounts.

When raising a claim of improper denial of a motion for severance, the burden is on the defendant to show specific prejudice resulting from the joint trial, and the inquiry of the appellate court must be whether the defendant was afforded a fair trial. *United States v. Moten*, *supra*, *United States v. DiGiovanni*, F.2d (2d Cir. 1976); *United States v. Borelli*, 435 F.2d 500, 502 (2d Cir. 1970), *cert. denied*, 401 U.S. 946 (1971); *United States v. DeSapio*, 435 F.2d 272, 280 (2d Cir. 1970), *cert. denied*, 402 U.S. 999 (1971); the burden placed upon the defendant is a "difficult" one, *United States v. Finkelstein*, F.2d 517, 525 (2d Cir. 1975), *cert. denied*, 525 U.S. (1976); *United States v. DiGiovanni*, *supra*, at 4. The defendant must show "substantial prejudice," *United States v. Corr*, 543 F.2d 1042 (2d Cir. 1976). Even where the joined defendants have inconsistent defenses, or choose trial tactics arguably detrimental to each other in some way, the denial of severance has been upheld. *United States v. Sacco*, Dkt. No. 76-1373, slip. op. 6203 (2d Cir. Oct. 5, 1977); *United States v. Ricco*, 549 F.2d 264 (2d Cir.), *cert. denied*, 45 U.S.L.W. (Apr. 28, 1977). The standard of the appellate court is whether the District Judge abused his broad discretion in denying the severance motion. *United States v. Miley*, 513 F.2d 1191 (2d Cir.), *cert. denied*, 423 U.S. 842 (1975); *United States v. Bernstein*, 533 F.2d 775 (2d Cir.), *cert. denied*, 429 U.S. 998 (1976); *United States v. Cohen*, 518 F.2d 727 (2d Cir.), *cert. denied*, 423 U.S. 926 (1975).

The District Judge was well aware of the full scope of Arroyo's prior cooperation, having reviewed extensive materials [See *Sealed Addendum to Government's Brief*]. He was also fully familiar with the remainder of the trial testimony, and the extent to which it simply confirmed the information Arroyo had given the agents. He was in a position to judge the frivolous nature of the motion to sever on the ground that cross-examination was improperly curtailed, and he denied that motion, saying,

"I know you are trying to manufacture an argument on appeal, but what I am trying to do is try a fair case." (Tr. 1658). Here, all the facts show conclusively that to pursue the proposed cross-examination would have been of no benefit to Arroyo, that there was consequently no prejudice whatever as a result of his joinder with the co-defendants, and that the District Judge, in denying Arroyo's motion to sever, did not abuse his discretion.

POINT VI

Similar Act Evidence was Properly Received Against Gomez and Rayo, and The Evidence Against Gomez was Clearly Sufficient for Conviction.

Both Rayo and Gomez argue that the evidence of their participation, with two others, in the smuggling of seventeen pounds of cocaine from a Gran Colombiana Line ship in Portland, Oregon in October, 1976, should not have been admitted against them, Gomez claims because the acts were remote in time from the crime charged here, and both argue because the evidence did not show their participation in the crime. In their arguments counsel misstate the facts proved at trial and the applicable law.

It is settled law in this Circuit that evidence of other crimes is admissible, if relevant, except when offered solely to prove criminal character or disposition. *United States v. Papadakis*, 510 F.2d 287, 294-95 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975); *United States v. Gerry*, 515 F.2d 130, 140-41 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975); *United States v. Williams*, 470 F.2d 915, 917 (2d Cir. 1972); *United States v. Johnson*, 382 F.2d 280, 281 (2d Cir. 1970); *United States v. Deaton*, 381 F.2d 114 (2d Cir. 1967). Among the purposes for which prior and subsequent similar acts are admissible are proof of

knowledge, intent, identity, and plan or design. Rule 404(b), F. R. Ev.; *United States v. Miller*, 478 F.2d 1315, 1318 (2d Cir.), *cert. denied*, 414 U.S. 851 (1973); *United States v. Freedman*, 445 F.2d 1220, 1224 (2d Cir. 1971); *United States v. Johnson*, *supra*.

Such proof is admissible even when the acts occurred *after* the crime charged in the indictment, *United States v. Cavallaro*, 553 F.2d 300 (2d Cir. 1977); *United States v. Rosenwasser*, *supra*; *United States v. Grady*, 544 F.2d 598 (2d Cir. 1976); and, in fact, even when the similar acts involve co-conspirators not on trial, *United States v. Araujo*, *supra*. The probative value of such evidence, which the trial court must determine, is dependent on "the existence of a close parallel between the crime charged and the acts shown". *United States v. Chestnut*, 533 F.2d 40 (2d Cir.), *cert. denied*, 429 U.S. 829 (1976). The proof need not be beyond a reasonable doubt, and the "fit need not be too tight." *United States v. Leonard*, 524 F.2d 1076, 1091 (2d Cir. 1975), *cert. denied*, 425 U.S. 958 (1976). See also, *United States v. Braunig*, *supra*.

Furthermore, where a conspiracy is charged, such acts may be proved to demonstrate the existence of the conspiracy and to show that an individual defendant participated in the conspiracy. *United States v. Papadakis*, *supra*; *United States v. Cohen*, 489 F.2d 945 (2d Cir. 1973); *United States v. Nathan*, *supra*.

It is apparent that the evidence relating to Portland closely paralleled the evidence of the crime here charged and sufficiently demonstrated a "common scheme or design" and "intent" to commit the crime charged here to be clearly admissible.*

* See discussion of facts, *supra*, pages 12-13.

First, it should be noted in response to Gomez' argument that the Portland smuggling venture occurred during the last weekend in October, 1976, which was nine, not eleven, months after the crime of which Gomez and Rayo were convicted in this case. This is well within the closeness in time which this Court has referred to as one factor in evaluating whether there is a sufficiently "close parallel between the crime charged and the acts proved" to warrant their admission. *United States v. Chestnut, supra.*

Second, as to each defendant, the facts proved at this trial concerning the events in Portland showed close parallels with all the other evidence about their roles in the crime charged here. As to Rayo, facts as proven showed that a car in which Rayo had been seen driving about town that weekend and reconnoitering the dock area, had stopped, in the early morning hours of October 31, 1976 near a bridge slightly upstream from where a Gran Colombiana ship was docked in Portland; a small man had run from the car to the pilings and rapidly retrieved a bundle, then re-entered the *back* seat of the car, which sped off followed by police; the bundle of cocaine was thrown from the car during the chase; and moments later, the car was stopped, with Rayo still in back seat, the only passenger in the car. The jury could infer from evidence that it was Rayo who had retrieved the bundle of cocaine, and, since he knew precisely where to find it quickly under the pilings, that he had placed it there. The damp wetsuit in the hotel room which he had been seen entering earlier that weekend was identical to that he had worn the night of May 27, 1976, and to those described by Rivas as worn by Arroyo and Rayo in January, 1976.

Consequently, there was a striking similarity in the patterns of Rayo's acts in January or early February,

1976, on May 27, 1976, and in October, 1976. Particularly in view of Rivas' testimony that Rayo had stated that his occupation was to swim to ships for contraband, the minor dissimilarities in location of the vessel and manner of retrieval of the cocaine are insignificant.

Likewise, the evidence as it related to Gomez showed Gomez occupying a low-profile position similar to that he occupied in January and February, 1976, in San Francisco. (See statement of facts, pages 7-11 *supra*.) He was not observed reconnoitering the dock area, swimming, retrieving the package of cocaine from the bridge pilings near the ship, or participating in the midnight high-speed chase during which the package of cocaine was jettisoned. He did, however, share connecting motel rooms that weekend with the three men who were so involved; he was found there with a duffel bag containing damp overalls, and a wetsuit identical to those used by Arroyo and Rayo in San Francisco, immediately after the chase which had resulted in the arrest of two of those men and the escape of a third; and photographs found in the rooms portrayed him posing together with two of the three, wearing the same clothes they were wearing in Portland that weekend. Reasonable inferences could be drawn from this evidence that he was in Portland to participate with them in their activities. These gain strength when coupled with evidence concerning his role in San Francisco in February, 1976. Then, too, he did not retrieve the cocaine or go near the piers; he simply contacted the sailor aboard the vessel who had brought the cocaine to San Francisco, made the arrangements for its discharge overboard (Tr. 336-338), awaited its delivery by the swimmers to his apartment, identified which of the packages contained the cocaine belonging to himself and Moreno, participated as the packages were counted and divided (Tr. 370), received the money from one of the first sales from that shipment (Tr. 385-90), and altogether acted

as overseer and general manager.* The jury could reasonably infer that had he not been thwarted, in Portland, by the arrest of his associates and seizure of the shipment of cocaine, he would likewise have performed the same functions there.

Both Rayo and Gomez claim that the evidence of the Portland similar acts was improperly placed before the jury, since "although Rayo was at the scene and the crime was proven, his involvement in it was not" (Br. 14), and the evidence concerning Gomez was "in and of itself not incriminating." (Br. 8). Those arguments wholly disregard the facts that Rayo had already pleaded guilty to that crime, and at the time of this trial was serving sentence of fifteen years imposed by the District Court in Portland, and that the evidence of Gomez' guilt, though largely circumstantial, had been sufficient to warrant his conviction in Portland on six counts of an eight-count indictment arising from the events of that weekend. The Government was entitled to prove at this trial not only the underlying facts, as it did, but also the fact of the convictions, which it did not. *United States v. Eliano*, 522 F.2d 201 (2d Cir. 1975); *United States v. Vario*, 484 F.2d 1052 (2d Cir. 1973), *cert. denied*, 414 U.S. 1129 (1974). Furthermore, as discussed above, the law permits proof of similar acts even if the evidence does not show guilt beyond a reasonable doubt, so long

* Far from showing "mere association" as Gomez argues in his brief, the evidence thus showed Gomez to be a controlling member of the conspiracy. See discussion, *supra*, pages 7-11). The evidence here, viewed in the light most favorable to the Government, *Glasser v. United States*, 315 U.S. 60, 80 (1942), is such that "a reasonable man might fairly conclude guilt beyond a reasonable doubt," the standard applicable here. *United States v. Chestnut*, *supra*; *United States v. Freeman*, 498 F.2d 569, 571 (2d Cir. 1974). The conviction should not be reversed for insufficiency of evidence.

as there is a significant parallel with the crimes charged. *United States v. Chestnut, supra*; *United States v. Leonard, supra*; see also, *United States v. Braunig, supra*.

Finally, Gomez argues that the admission of this similar act evidence prevented his testifying in his own behalf. In do so, he ignores the fact that this conviction was proper impeachment material under Rule 609, F. R. Ev., whether or not it had been independently proved as a similar act.

Clearly, the District Court properly admitted the evidence of the Portland similar acts against Gomez and Rayo.

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

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 : ss.:
COUNTY OF NEW YORK)

CONSTANCE CUSHMAN, being duly sworn,
deposes and says that she is employed in the office
of the United States Attorney for the Southern District
of New York.

That on the 14th day of February, 1978,
she served a copy of the within Brief by placing
the same in a properly postpaid franked envelope
addressed:

To all counsel of record.

And deponent further says that she sealed the said
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Constance Cushman

Sworn to before me this
14th day of February, 1978

Maureen Egan

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